No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 19

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

JESSE A. MUELLER,
De Young Building, San Francisco,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

Appellant's sole contention is that the District Court acted without jurisdiction in disallowing appellant's claim for attorney's fees. Appellant cites authorities relative to appeals from DECISIONS of a referee in the nature of judicial determinations.

The appellee contends that the action of a referee in allowing attorney's fees is *not* a judicial act but an administrative one and if void, made in error or by mistake, is always subject to review by the District Judge before the estate is closed.

LAW ARGUMENT.

It is a fact that all of the parties in this matter acted sincerely and honestly believed that they were within their rights, and that there is no suggestion of fraud or misrepresentation in the slightest degree, but a mistake was made and the District Court, as a court in equity, may always rectify a mistake.

> "We see no force in the contention that the referee's allowance of petitioner's account amounted to an adjudication which the District Judge had no jurisdiction to set aside. Had the claim been that of a creditor, it would, under section 57k of the act (section 9641), be subject to reconsideration and rejection, in whole or in part, at any time before the estate was closed. But while the claim was not that of a creditor, and so not subject to the statute, it was, nevertheless, being an administrative order, subject at any time before the closing of the estate to re-examination and to such disposition as the equities of the case require. In re Ives (C. C. A. 6), 113 Fed. 911, 51 C. C. A. 541; Davidson v. Friedman (C. C. A. 6), 140 Fed. 853, 72 C. C. A. 553. A court of bankruptcy is a court of equity (Bardes v. Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175) and has undoubted jurisdiction to set aside an allowance for services and expenses of an attorney to one of its officers, when it satisfactorily appears that the allowance was procured through fraud. The allowance of the claim was thus not a final adjudication.
>
> The proposition that the referee alone had jurisdiction to re-examine the claim does not impress us. It is not accurate to say that the action allowing the claim was solely that of the referee;

in a much more proper sense it was directly the action of the District Judge. * * * The latter had complete authority, notwithstanding the general reference, to take to himself the allowance of claims of this nature. The action had was as effectively that of the judge as if had under a positive order withdrawing that subject from the referee's consideration, or as if the referee had in the first instance allowed the claim, and the matter then been brought before the District Judge for review. * * * We have lately had occasion in two cases to consider the jurisdiction of a court of bankruptcy to proceed on its own motion to correct an erroneous allowance or a fraudulent action. International Corporation v. Cary, 240 Fed. 101, 104, 105, 153 C. C. A. 137; In re Veler, 249 Fed. 633, 644, 161 C. C. A. 543."

In re De Ran, 260 Fed. 732, 740.

"The allowance by the referee (for services of an attorney) is not a final adjudication, but a mere administrative order subject at any time before the closing of the estate, to re-examination."

Collier on Bankruptcy, 13 Ed., Sec. 1358;

In re Cintion, 2 A. B. R. (N. S.) 369.

"Thus, in discretionary matters such as an allowance of attorney's fees, the referee's discretion will not be disturbed in the absence of clear mistake of fact or law."

Section 3669, *Remington on Bankruptcy,* Vol. 8, p. 48;

In re American Range and Foundry Co., 41 Fed. (2d) 845, 7 A. B. R. (N. S.) 170.

> "An order of a referee making an allowance to the Trustee's attorney has been held in one case not to be 'final' but to be subject to re-examination at any time before the closing of the estate."
>
> Section 3649, *Remington on Bankruptcy; In re Cintion,* supra.

This matter is presented upon a stipulation signed by the attorney for the trustee limiting the record to only the order of August 12, 1932, the agreed statement of the case and the opinion of the District Judge. Consideration should also be given to the following statements contained in Appellant's Petition for Allowance of Appeal on file in this court:

> 1. "On May 17th, 1930, G. A. Blanchard was appointed and qualified as receiver and acted as such until July 1st, 1930." (Document 1, p. 1, lines 17 and 18, Appellant's Petition for Allowance of Appeal.)
>
> 2. "That at the hearing of the said receiver's and trustee's first account the following claims and allowances were made for counsel fees:
>
> Louis E. Goodman, attorney for petitioning creditors, claimed $250.00; Louis E. Goodman, attorney for receiver, claimed $3,000.00, allowed $1,000.00 (on both amounts)." (Document 5, page 3, Appellant's Petition for Allowance of Appeal.)

It is apparent from the record that the receiver filed only one account and that appellant's claim for five hundred and no/100 ($500.00) dollars additional attorney's fees is based upon his "attending hearings in connection with the settlement of the

receiver's first account herein and in determination of the respective rights of creditors of the receiver, etc." (Appellant's Brief, p. 7.)

His claim is for services rendered after the qualification of the trustee on July 1, 1930, and after the settlement of the receiver's account.

> "After the qualification of the trustee, the receiver is automatically divested of all authority and power to represent the estate."
>
> *Boonville National Bank v. Blakey,* 107 Fed. 891.

Appellant is therefore in no better position than an attorney appearing in the bankruptcy court representing a creditor or other litigant.

A reversal in this matter would permit the referee to allow attorney's fees in excess of the amount allowed by rule and to attorneys not entitled thereto, and if no party interested in the estate should seek a review, the order would become final.

Dated, San Francisco,
April 3, 1933.

Respectfully submitted,
JESSE A. MUELLER,
Attorney for Appellee.